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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROYAL SUN ALLIANCE INSURANCE PLC, *Plaintiff,* - against - UPS SUPPLY CHAIN SOLUTIONS, INC., WORLDWIDE DEDICATED SERVICES, INC., AND INTERNATIONAL MANAGEMENT, SERVICES COMPANY, INC., et al., *Defendants.*	Case No. 09 Civ. 5935 (LTS) MOTION IN LIMINE No. 2 of 6.

MEMORANDUM OF LAW OF DEFENDANTS INTERNATIONAL MANAGEMENT SERVICES COMPANY, INC. AND TFE LOGISTICS GROUP, INC. (collectively, "IMSCO") IN SUPPORT OF DEFENDANTS' MOTION IN

LIMINE TO PRECLUDE TESTIMONY OF PLAINTIFF'S EXPERT WITNESS RICHARD P. MILLMAN, M.D.

CERTIFICATION

Pursuant to the Court's Individual Rule 2B, IMSCO certifies that it has used its best efforts to informally resolve the matters raised herein, including a detailed written exchange with counsel for Plaintiff of the factual and legal matters raised and telephonic conference. Unfortunately, the matter could not be resolved informally.

Dated: 11 February 2011

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a cargo damage claim brought by the insurance company for cargo-owner Ethicon arising from a tractor-trailer accident which occurred on March 26, 2009 in the outskirts of Little Rock, Arkansas on eastbound I-30. James Crews was driving the unit on the regular route of the team drivers at the time of the accident, with his co-driver Charles Harrison asleep in the sleeper berth of the tractor.

While proceeding north-east from their last stop in Ranger, Texas, Mr. Crews lost control of the unit shortly before 9:30 pm central time and his tractor-trailer struck the center divider after leaving tire marks which commenced in the left-most travel lane. In the emergency room, he reported to the investigating state trooper that he had been driving in the middle of three lanes when he was cut off by another semi. He stated he avoided contact with the other truck but struck the center divider as a result. (Exhibit "1" Trooper Plouch depo 15:19-16:6, to the Declaration of Bruce A. Lindsay)

Despite overwhelming evidence that Mr. Crews was not fatigued at the time of the accident, Plaintiff's expert witness Dr. Millman speculates that Mr. Crews had sleep apnea and was at greater risk of falling asleep at the wheel while diving his tractor-trailer. (Exhibit "2" Millman report page 1, to the Declaration of Bruce A. Lindsay) Dr. Millman did not address critical evidence relating to the lack of fatigue of Mr. Crews at the time of the accident in reaching his opinion. Instead, he based his opinion on his assertion that Mr. Crews suffered undiagnosed sleep apnea due to his size and medical conditions of hypertension (high blood pressure) and type II diabetes. (Exhibit "2" page 1)

Dr. Millman's claim that Mr. Crews was at greater risk of dozing off or falling asleep at the wheel while driving his tractor-trailer fails to take into account the fact there is no evidence that anyone ever observed Mr. Crews to be fatigued while driving. He does not address the observations of co-driver Charles Harrison, a retired police chief trained in observing lack of alertness in individuals, that he did not see any evidence that Mr. Crews appeared fatigued when they ate together the afternoon of the accident. (Exhibit "3" Harrison depo 19:21-20:8; 35:5-17, to the Declaration of Bruce A. Lindsay).

He also did not analyze Mr. Crews' work-rest schedule, the regularity of his driving schedule, his activities in the twenty-four hours preceding the accident, or the status of his circadian rhythm at the time of the accident. (Exhibit "2" Millman report pages 1-4)

Such unfounded and speculative opinions of a physician are properly precluded by virtue of the *Daubert* gate-keeper role of the trial court.[1]

Co-driver Harrison testified in his deposition that Mr. Crews was conscientious in not driving over the 10 hours allowed by the Department of Transportation ("DOT"). He never observed Mr. Crews to be fatigued and, importantly, on the day of the accident when they ate together at 3:00 pm central time he observed no signs of fatigue. He did not observe anything about Mr. Crews that caused him to be concerned that Mr. Crews was fatigued before he climbed into the sleeper berth and Mr. Crews began to drive. (Exhibit "3" Harrison depo 19:21-20:8; 35:5-17)

Team drivers Crews and Harrison worked a regular work schedule which afforded them ample opportunity for rest-sleep time, both during their work schedule and during their time off of duty. (Exhibit "4" Krueger report of October 19, 2010 pages 2-3, to the Declaration of Bruce A. Lindsay). They would drive their route from Cornelia, Georgia to San Angelo, Texas, then to Memphis, Tennessee and back to Cornelia twice weekly. The trip would start in Cornelia on Sunday afternoons and they would return Tuesday mornings. They then would leave Wednesday afternoons and return Friday mornings, giving them Friday and Saturday evenings off. Mr. Crews was the night driver for the team. (Exhibit "3" Harrison depo 22:20-25:15; 27:2-28:3)

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[1] See *U.S. Xpress, Inc. v. American Field Service Corp.*, 2008 U.S. Dist. Lexis 57940 (N.D. Miss. June 26, 2008), discussed *infra*.

Both Mr. Crews and Mr. Harrison "easily" were able to observe the hours limitations for being on duty and for driving as required by the DOT in servicing their route schedule for Ethicon, which was confirmed by an audit of their drivers' logs that showed their compliance with DOT permissible hours of service. (Exhibit "5" Chewning report of October 19, 2010 page 7, Exhibit "4" Krueger report pages 2-3, to the Declaration of Bruce A. Lindsay)

The accident occurred at a time when the circadian rhythm of Mr. Crews would have been in a state of increased core body temperature, which promotes an awake state in individuals. As he was driving during his regular shift, with ample rest-sleep opportunity during the 12 hours preceding the start of his shift and was in the heightened awake state of his circadian rhythm, it would have been very difficult for Mr. Crews to fall asleep at 9:30 pm central time on the date of the accident. (Exhibit "4" Krueger report page 3)

Neither the personal physician of Mr. Crews, Asha Parikh, M.D., nor the certified commercial driver medical examiner Nicola Lee, M.D., diagnosed Mr. Crews as suffering from sleep apnea. While Dr. Lee examined Mr. Crews in a routine DOT evaluation 11 months prior to the accident, Dr. Parikh followed the medical condition of Mr. Crews for nine years before the accident. (Exhibits "6" Medical chart of Dr. Lee and "7" medical chart of Dr. Parikh, to the Declaration of Bruce A. Lindsay)

Despite the claim of Plaintiff that Dr. Lee was "IMSCO's doctor," Dr. Lee was not employed by IMSCO. She worked for Concentra Medical Center to which IMSCO sent drivers for medical evaluations. (Exhibit "8" Beeson depo 50:25-51:12, to the Declaration of Bruce A. Lindsay)

There is no evidence that Mr. Crews suffered from any symptom associated with sleep apnea, such as day-time sleepiness, pauses in breathing while sleeping or loud snoring. Though he did snore according to Mrs. Crews, it was not loud enough to bother her, and Mr. Harrison never heard him snoring at all. (Exhibits "9" Crews depo 13:16-14:5 and "3" Harrison depo 54:18-55:3, to the Declaration of Bruce A. Lindsay)

In the face of the evidence, Dr. Millman raises his opinion Mr. Crews had sleep apnea and was at a greater risk of falling asleep while driving.[2] He goes on to opine that the standard of care required Dr. Lee to send Mr. Crews for testing for sleep apnea and, without any authoritative support, that IMSCO did not exercise reasonable care by not sending Mr. Crews for

[2] Plaintiff and Dr. Millman cite two notations in the records of the Children's Hospital of Arkansas Burn Center that purportedly "diagnose" Mr. Crews as suffering from sleep apnea. The first is a notation by a patient care planner which indicates sleep apnea as a pre-existing condition of Mr. Crews based on her interview of Mrs. Crews, but Mrs. Crews testified that she did not know what that condition was and no one had diagnosed her husband with it. (Exhibit "9" Crews depo 24:22-31:12) The second notation is a pre-anesthesia note which apparently reiterated this "diagnosis." There is no evidence in the records of the Burn Center that Mr. Crews was tested for and found to suffer from sleep apnea. As he was intubated and on a ventilator while the staff attempted to save his life, it is inconceivable that he was tested for sleep apnea at that facility for any reason.

such testing, though he was certified as qualified to drive a commercial vehicle by Dr. Lee, a certified commercial driver medical examiner.

While Dr. Millman may testify as to the statistical chance that Mr. Crews had sleep apnea, this provides no basis for opinion testimony as to the state of Mr. Crews at the time of the accident.

Without citing any evidence that Mr. Crews was fatigued at the time of the accident, nor any evidence that he likely was fatigued based on an analysis of the work-rest schedule of Mr. Crews, his shift regularity, his hours of service compliance or the state of his circadian rhythm at the time of the accident, Dr. Millman is not competent to testify regarding the status of Mr. Crews regarding possible fatigue at the time of the accident or to proffer testimony regarding what happened in the accident.

Nor is Dr. Millman qualified to testify as to the standard in the transportation industry. He has not reported that he has a background in the transportation industry that would allow him to opine on the standard of care for the employer of commercial drivers regarding sending their drivers for testing for sleep apnea based on their size or some unrelated medical condition. To the contrary, his background is devoid of any expertise in this industry.

On the other hand, Karol Beeson, then-Director of Operations of IMSCO will testify regarding the standard of care for IMSCO as the employer of Mr. Crews regarding testing for sleep apnea. She will testify that the standard for determining whether commercial drivers are physically qualified to drive requires the employer to send drivers for their required medical examinations by a certified medical examiner such as Dr. Lee. Further, she will testify that employers of commercial drivers are not required by the standard of care to send drivers for sleep apnea testing without a doctor's recommendation, as the IMSCO relies on the medical evaluation by the certified medical examiner. (Exhibit "8" Beeson depo 51:13-53:4; 54:10-15; 56:10-22; 56:24-57:12)

II.

THE TRIAL COURT IS CHARGED WITH THE RESPONSIBILITY TO DETERMINE THE QUALIFICATION OF A PROPOSED EXPERT WITNESS TO OFFER OPINION TESTIMONY AT TIME OF TRIAL.

To be admissible at time of trial, the testimony of an expert must meet the requirements of Federal Rules of Evidence 702 which allows opinion testimony of an expert qualified by knowledge, skill, experience, training or education to state an expert opinion if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993) recognized the gate-keeper function of the trial court and, along with refinements by its progeny, the trial court has been directed that in considering the admissibility of an expert's opinion, it must make a three part determination: is the expert qualified to testify on the subject matter; do the expert's methods yield reliable testimony; and is the testimony relevant. See *Nimely v. City of New York*, 414 F. 3d 381, 396-97 (2d Cir. 2005).

In this case, Dr. Millman makes a diagnosis that Mr. Crews had obstructive sleep apnea based on his body size and his non-sleep apnea medical conditions of hypertension and type II diabetes. There is no evidence in the case he had symptoms of sleep apnea, such as daytime sleepiness, fatigue, loud snoring or interruptions in breathing during his sleep. Dr. Millman never saw or evaluated Mr. Crews, nor saw any sleep testing data for him (as none is known to exist.)

In short, he is reaching his diagnosis based on statistics, not evidence. His opinion runs afoul of the criteria for admissibility.

A. Qualification.

Dr. Millman is undoubtedly qualified to diagnose sleep apnea in a patient under the proper circumstances. However, he has not done so here. Additionally, he has failed to provide any basis in his report that would support that he is qualified to express opinions on the standard of care for an employer of a commercial driver regarding testing drivers for sleep apnea despite medical certification of the driver by a certified DOT medical examiner. He also has no qualification to testify as to what happened in the accident.

The Court must examine the expert's qualifications "not . . . in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question." *Microfinancial, Inc. v. Premier Hotels Int'l, Inc.*, 385 F. 3d 72, 80 (1st Cir. 2004). Thus, the questions which Dr. Millman must address are: what evidence is there that Mr. Crews had sleep apnea; what qualifies Dr. Millman to opine that Mr. Crews was fatigued at the time of the accident; and what qualifies Dr. Millman to opine on the responsibility of IMSCO to disregard the medical certification of its driver by a DOT certified medical examiner and demand further testing of its employee.

Dr. Millman has not provided any evidence that he is qualified to offer an opinion of the possible fatigue of Mr. Crews at the time of the accident or that he is competent to offer an opinion of the alleged responsibility of IMSCO to demand further testing of its employee. While he is qualified to diagnose sleep apnea under the proper protocol, the lack of evidence that Mr. Crews had sleep apnea disqualifies his opinion in that respect as well.

B. Reliability.

i) The diagnosis of sleep apnea by Dr. Millman is based on statistics and not medical evidence.

The basis for Dr. Millman's opinion is his claim there is an increased incidence of sleep apnea in individuals who are obese, have hypertension and type II diabetes. However, he is alone in his opinion that Mr. Crews had obstructive sleep apnea, as both the long-time personal physician of Mr. Crews, Dr. Parikh, and the certified DOT medical examiner who saw and examined him, Dr. Lee, did not entertain that diagnosis for their patient.

Dr. Millman cites as a basis for his conclusions a study which analyzed 90 commercial truck drivers for sleep apnea.[3] The authors did not make their diagnoses of these drivers based on body mass index ("BMI"), hypertension or type II diabetes, as does Dr. Millman with Mr. Crews. They subjected the drivers to sleep studies using a device which monitored the heart rate, snoring sounds, oxygen saturation and body position of the drivers. Those drivers that could not complete the sleep study were discarded from the analysis. The accepted method for diagnosing sleep apnea is to perform a sleep study on the individual.[4]

Undoubtedly, were Dr. Millman asked to diagnose whether any particular patient had sleep apnea he would do the same as these experts – perform a sleep study using a monitor to determine the proper diagnosis. It is clear that he would not simply look at the patient's medical records and, without even casting eyes upon the patient, diagnose him or her with sleep apnea, let alone their degree of sleep apnea and predicting their level of consciousness at a particular moment, as he is seeking to do here.

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[3] Stoohs, Guilleminault, Itoi and Dement, *Traffic Accidents in Commercial Long-Haul Truck Drivers: The Influence of Sleep-Disordered Breathing and Obesity* (1994) Sleep 17(7):619-23. (Exhibit "10" to the Declaration of Bruce A. Lindsay)

[4] Exhibit "11" Dr. Lee depo 14:1-15, to the Declaration of Bruce A. Lindsay: "Q. Do you know how sleep apnea is diagnosed by medical practitioners? A. Ideally you send them to a pulmonologist and they have a sleep study, an overnight sleep study. That's how they're diagnosed.")

Thus, with no evidence that Mr. Crews had any symptoms of sleep apnea and without sleep testing results to diagnose that he did, Dr. Millman opines that Mr. Crews had sleep apnea. However, as noted by Dr. Lee, a person with a large neck and who is obese will not necessarily suffer from sleep apnea.[5] The diagnosis of Dr. Millman is speculative, based on statistics and not the evidence.

ii) The opinion that Mr. Crews was at a greater risk of dozing or falling asleep is speculative whether he was asleep at the time of the accident.

Dr. Millman then seeks to go further. Without a definitive diagnosis that Mr. Crews suffered from sleep apnea, he speculates that Mr. Crews was at a greater risk of dozing or falling asleep while at the wheel.

The methodology of Dr. Millman is completely flawed for his failure to report that he analyzed any aspect of Mr. Crews' work-sleep schedule or his activities that would bear on whether Mr. Crews was possibly fatigued at the time of the accident or not. First, he does not qualify what the degree of risk he believes there was that Mr. Crews may doze or fall asleep at the wheel. Greater than what? The opinion is vague to the point of uselessness.

He did not review the driver's log of Mr. Crews or Mr. Harrison. He points out no evidence that anyone ever observed Mr. Crews to be fatigued while driving and he did not report that he had analyzed Mr. Crews' work-rest schedule, the regularity of his driving schedule, his activities in the twenty-four hours preceding the accident, the status of his circadian rhythm at the time of the accident or his physical appearance to his co-driver Mr. Harrison on the very day of the accident.

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[5] Exhibit "11" Dr. Lee depo 13:1-25)

Without an analysis of these factors, Dr. Millman's opinion cannot assist the Court in determining what happened in the accident, as it is pure speculation which must be precluded by virtue of *Daubert*. Dr. Millman's opinion that Mr. Crews was at greater risk of dozing or falling asleep while driving is unreliable and should be ruled inadmissible.

iii) Dr. Millman lacks the expertise to offer the opinion that IMSCO had a responsibility to test Mr. Crews for sleep apnea independent of the certification of Dr. Lee; the opinion is unreliable.

Dr. Millman did not provide any basis in his report that would support that he is qualified to express opinions on the standard of care for an employer of a commercial driver regarding testing drivers for sleep apnea even though the driver has been given a medical certification as physically qualified to drive by a certified DOT medical examiner, such as Dr. Lee.

To the contrary, Ms. Beeson who was the Director of Operations for IMSCO will testify that IMSCO was following the standard of care in relying on the medical evaluation and certification of Mr. Crews by a qualified DOT medical examiner. The standard does not require that an employer of a commercial driver second-guess a physician, let alone in a case, as here, where there is no evidence that the driver showed any symptoms of sleep disorders, including sleep apnea.

This opinion of Dr. Millman is not reliable and follows no accepted methodology.

C. The "diagnosis" of sleep apnea does not provide relevant evidence of the cause of the accident.

Even were the Court to admit Dr. Millman's opinion that Mr. Crews had sleep apnea at trial, it tells the Court nothing about the accident or the physical state of Mr. Crews regarding his fatigue or lack of fatigue at the time of the accident. Persuasive on-point authority has recognized this glaring causal disconnect and has forbidden the physician to testify as to what happened in the accident in a case in which the physician opined that the driver had obstructive sleep apnea. *U.S. Xpress, Inc. v. American Field Service Corp.*, 2008 U.S. Dist. Lexis 57940, at *4-5 (N.D. Miss. June 26, 2008).

In *U.S. Xpress*, the court precluded the physician from testifying or proffering opinions "as to what happened on the night of the accident," though the physician was allowed to testify to the possible effects of his medical condition, *where his medical records indicated the degree of his sleep apnea* and he had symptoms of "fatigue and sleepiness," circumstances not existing here.

Thus, not only would it be improper speculation for Dr. Millman to testify as to what occurred on the night of the accident, but there is no evidence in the medical records of Mr. Crews that he suffered from fatigue, sleepiness or sleep apnea, as did the driver in *U.S. Xpress.*

Dr. Millman does not report that he analyzed any aspect of Mr. Crews' schedule or activities that would bear on whether Mr. Crews was possibly fatigued at the time of the accident or not. He did not review the driver's log of Mr. Crews or Mr. Harrison. He points to no evidence to show that anyone ever observed Mr. Crews to be fatigued while driving and he did not report that he had analyzed Mr. Crews' work-rest schedule, the regularity of his driving schedule, his activities in the twenty-four hours preceding the accident, the status of his circadian rhythm at the time of the accident or his physical appearance to his co-driver Mr. Harrison on the date of the accident.

His opinion that Mr. Crews had sleep apnea is not relevant, as he has failed to show that it had any relation to the accident.

Moreover, his criticism of Dr. Lee for her purported failure to diagnose sleep apnea in Mr. Crews is irrelevant as she was employed by Concentra Medical Clinic and IMSCO is not responsible for any purported failure on her part to diagnose sleep apnea. The criticism is also spurious, in view of Dr. Millman's silence regarding the lack of a diagnosis of any sleep disorder, including sleep apnea by Dr. Parikh, Mr. Crews' personal physician of many years. He criticizes the physician that saw Mr. Crews for a routine DOT examination, yet is silent regarding the non-diagnosis of sleep apnea by a doctor that saw and cared for Mr. Crews over a period of nine years.

Finally, lacking expertise in the standard of care of employers of commercial drivers, the opinion of Dr. Millman that IMSCO as an employer of a commercial driver was responsible for testing drivers for sleep apnea despite medical certification of the driver by a certified DOT medical examiner is irrelevant as well.

The Court should preclude the testimony of Dr. Millman. His opinion that Mr. Crews had sleep apnea is not based on reliable methodology only statistics. He points to no symptoms of sleep apnea reported for Mr. Crews as supportive of his diagnosis. Moreover, such diagnosis does not provide evidence of what happened in the accident, as Dr. Millman has not causally connected the condition to the accident by demonstrating any evidence of fatigue in Mr. Crews that would account for the accident.

III.

THE BURDEN IS UPON THE PARTY PROFFERING THE TESTIMONY OF AN EXPERT TO ESTABLISH THAT THE EXPERT MEETS THE NECESSARY CRITERIA TO OFFER OPINION TESTIMONY AT TRIAL.

When expert testimony is challenged under *Daubert*, the burden of proof rests with the party seeking to present the testimony. *Moore v. Ashland Chemical, Inc.*, 151 F. 3d 269, 276 (5^{th} Cir. 1998); *Lava Trading, Inc. v. Hartford Fire Ins. Co.*, 2005 U.S. Dist. Lexis 4566, at *24 (S.D.N.Y. 2005). Independent validation of the expert's methodology is required, not simple reliance upon the expert's assurances that he has used generally accepted scientific methodology.

Here, Dr. Millman has not followed accepted methodology to diagnose that Mr. Crews had sleep apnea. He has referenced no sleep tests to support his opinion, only statistics. He can point to no symptoms of sleep apnea of Mr. Crews to support his "diagnosis" other than "normal" snoring noted by his wife.

In the final analysis, his testimony can provide no relevant evidence, as he has not employed accepted scientific methodology to form the opinion that Mr. Crews was at a greater risk of dozing or sleeping at the wheel. He has not analyzed the rest or work activities of Mr. Crews, the regularity of his work schedule, his circadian rhythm or the time of day of the accident in relation to the foregoing factors, in order to support the opinion. Finally, he has not established that he is qualified to offer an opinion regarding the standard of care of an employer of a commercial driver to seek further medical testing of drivers who, like Mr. Crews, have been certified as qualified to drive by a certified DOT medical examiner.

Plaintiff cannot bear its burden of proof as to Dr. Millman, who should be precluded from testifying.

Dated: 11 February 2011

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